

3900 Paseo del Sol
Santa Fe, NM 87505
Ph: 505-424-9585
Cell: 505-660-1115
FAX: 505-424-1144

Board of Directors
board@nmipa.org

Chairman
Marianne Granoff
Regional Vice President
ZiaNet, Inc.

Vice Chair
Carl Muehlenweg
President
Lobo Internet Services, LTD.

Carroll Cagle
President
Cagle & Associates, Inc.

Jane Hill
President
Internet at Cybermesa

Gene Grant
Consultant
DW Turner, Public Relations

Barb Tomlin
President
Westward Connections, Inc.

Nelson Ward
Executive Director
NMIPA

Association Web Page:
www.nmipa.org

Education Web Page:
www.nmipa.net

Members Private Site:
www.nmipamember.net

Email:
info@nmipa.org



February 14, 2002

Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-204B
Washington, D.C. 20554

RE: CC Docket No. 01-337, In the Matter of Review of the
Regulatory Framework for Incumbent LEC Broadband
Telecommunications Services

Comments from the New Mexico Internet Professionals
Association (NMIPA).

The New Mexico Internet Professionals Association (NMIPA) is an association of 150 companies engaged in various businesses related to the Internet. These businesses include web developers, software companies, computer manufacturers, Internet Service Providers (ISPs), web hosting companies, competitive local exchange providers (CLECs), banks, attorneys, systems integrators, hardware dealers, and others.

NMIPA believes that all companies offering telecommunications services in New Mexico should have an equal opportunity to flourish in a truly competitive marketplace. NMIPA further believes that the Federal Communications Commission should seek to promote competition in the telecommunications industry in both the short term and in the long term when considering the regulatory framework for any telecommunications service.

With regard to incumbent LEC broadband telecommunications, in the recent past, the Federal

Communications Commission (FCC) has considered that broadband competition exists when there is more than one "mode" of broadband service available, i.e. cable versus DSL versus satellite versus wireless. NMIPA believes there are serious deficiencies in this premise when viewed from both an economic development viewpoint and a technical viewpoint, especially in the rural areas of the western states.

Background: New Mexico is the fifth largest state in geographical area and the 36th in population¹. The population density in the state is approximately 15 people per square mile. There are only a few communities that qualify as cities and only one of any significant size, Albuquerque. In spite of that, Internet deployment and use in New Mexico has always been strong. Until recently, there were approximately 80 ISPs based in New Mexico providing dial-in Internet access and dedicated leased-line Internet service throughout the state. It was possible for businesses and residents to have Internet access with a local phone call or a T1 connection from even the most rural communities. AOL and other national ISPs also provided dial-in service in larger communities.

Most national and New Mexico-based ISPs purchase telecommunications services from the local phone company. New Mexico is served by Qwest Communications, Valor Telecommunications, and 15 rural independent phone companies. There are also several competitive providers operating in Albuquerque. Many of the smaller independent phone companies are co-operatives. The smallest of these has less than 200 lines.

Qwest is the only phone company operating in New Mexico that is classified as a regional Bell-operating company (RBOC), based on its purchase of U S West. Qwest is the largest phone company serving New Mexico. It serves all of the largest communities in the state, including Albuquerque and Santa Fe. Valor purchased the GTE holdings in New Mexico in 2000 and is the second largest phone company serving the state. Valor has approximately 10% of the number of customers in New Mexico that Qwest has.

In the spring of 1998, Qwest (then U S West) introduced DSL services in several large communities in its 14 state service area. By late 1998, Qwest was selling DSL in 13 of its 14 states. New Mexico was the only state without DSL. New Mexico was the last state in Qwest's 14-state service area to have Qwest DSL services implemented. This did not happen until two full years after Qwest had introduced DSL in every other state in its area. Many people feel that Qwest was "punishing" New Mexico for actions by its state regulatory body.

¹ <http://www.50states.com/newmexic.htm>

It wasn't until two competitive DSL providers, Jato and New Edge Networks, introduced DSL in Albuquerque in 2000 that Qwest decided to also offer DSL services in New Mexico. Qwest now offers DSL in 18² of its 65 central offices (COs) in New Mexico. Seven of these COs are in Albuquerque; two each are in Los Alamos, Santa Fe, and Las Cruces. There are 5 other communities currently served with Qwest DSL. Of the 47 other Qwest COs where DSL is not offered,

18 are COs with over 65,000 lines.

13 are COs with 10,001 to 65,000 lines.

16 are COs with 3001 to 10,000 lines.

Competitive DSL providers are operating in 4 or 5 of these Qwest COs, but are offering DSL service primarily for business customers, not residential customers. Many Qwest residential and small business customers in these communities would like to be able to get Qwest DSL service, but Qwest has stated that it is not economically feasible for it to offer DSL services in any additional COs in New Mexico.

Valor will begin offering DSL service in New Mexico in April 2002 in its 5 largest communities. Valor has committed to provide DSL in any community in New Mexico where there are 75 qualified customers willing to sign a one-year contract for DSL service³.

Seven of the 15 independent rural phone companies are offering DSL services, including the one with only 200 lines.

The New Mexico ISP View: When Internet access was based on dial-up services and leased-line connections, competition among national ISPs and New Mexico ISPs was based on providing the best service. With the broadband services available in New Mexico today, competition is between two monopolies offering Internet access on their own proprietary broadband service and 14 New Mexico ISPs selling Qwest DSL services.

Among the broadband providers in New Mexico, only Qwest offers New Mexico ISPs the opportunity to provide Internet access to residential customers with a broadband connection.

- New Mexico based ISPs cannot sell Internet access using cable modems. The cable companies do not let New Mexico ISPs connect to their networks.

² http://www.qwest.com/disclosures/netdisclosure459/nm_data.html

³ Alternative Form of Regulation Plan, as amended, for VALOR Telecommunications of New Mexico, LLC, September, 2000.

- New Mexico ISPs cannot sell Internet access using satellite transmission. Satellite companies provide their own Internet access. They want to partner with companies that can install and sell equipment to end customers.
- New Mexico ISPs cannot sell Internet access over licensed wireless frequencies. The companies that have licensed wireless frequencies are selling their own Internet access.
- Some New Mexico ISPs sell Internet access via spread spectrum (unlicensed) wireless connections.

When New Mexico ISPs do purchase the capability to offer Qwest DSL services to their customers, they also have to compete with Qwest's favored ISP partner, MSN. Qwest runs full-page and half-page advertisements every day advertising "MSN broadband powered by Qwest". The Qwest web page has special promotions for MSN Internet access. There are inserts in Qwest bills to customers for special MSN broadband service powered by Qwest. MSN also has receives special pricing that is not available to New Mexico ISPs.

Qwest has several volume discount plans⁴ for its DSL service.

- The Basic Discount Option is for the customer who commits to having a minimum of 15,000 active and billable *QWEST DSL* lines by the end of their initial 12 month period. This plan provides discounts of 11% to 17% on monthly charges to the ISP customer.
- The Volume Commitment Option I plan allows the customer to choose the number of *QWEST DSL* lines they will acquire over the 36 month Fixed Period Service Rate Plan with a subscription range of 60,001 lines to 400,000 lines. This plan provides discounts of 14% to 17% on monthly charges to the ISP customer and waives non-recurring charges.
- The Volume Commitment Option II plan allows the customer to choose a 5-year Fixed Period Service Rate Plan with a minimum commitment of 150,000 subscription lines by the end of the first year and a minimum 200,001 subscription lines as of the end of the third, fourth and fifth year periods. This plan provides discounts to the ISP customer of 17% to 32% on monthly charges and waives non-recurring charges.

⁴ http://tariffs.uswest.com:8000/docs/TARIFFS/FCC/FCC1/fcc1_s008p301.pdf#USW-TOC000022

- The Volume Commitment Option III plan allows the customer to choose the number of *QWEST DSL* lines they will acquire over the 60-month Fixed Period Service Rate Plan with a subscription range of 120,000 lines to 500,000 lines. This plan provides discounts of 24.9% on monthly charges and has a \$35.00 activation charge per DSL customer in lieu of the non-recurring charge.

There is no New Mexico ISP with 15,000 Qwest DSL customers. There is no national ISP with 15,000 Qwest DSL customers in New Mexico. The only way to get 15,000 or more Qwest DSL customers is to also have Qwest DSL customers in states other than New Mexico.

Qwest is in the process of "transitioning" its qwest.net dial-up customers and its qwest.net DSL customers to MSN as the Internet provider. In New Mexico, some customers who originally signed up for qwest.net DSL service and paid for their own DSL equipment have already been switched to MSN. When some of these customers decided they did not want MSN as their ISP, they were told by Qwest that they would have to cancel their DSL service and have it re-installed in order to change ISPs. These customers would then have to pay the Qwest DSL re-install charges, of course. Many such customers and several New Mexico ISPs have contacted New Mexico's state regulatory body, the New Mexico Public Regulation Commission (PRC), about this situation. The PRC cannot help these New Mexico residents and ISPs, however, since Qwest DSL service is regulated by the FCC.

From a technical point of view, neither cable modems nor MSN broadband powered by Qwest can be used as a "routed" service. Both services are "bridged" only. Both MSN and Comcast impose extra charges for multiple PCs using their service; both companies have extra charges for a static IP address; both companies prevent the use of domain names on their service. Both companies charge businesses, even home-based businesses, more than they charge residential customers, if they allow businesses to use the service at all.

Local New Mexico ISPs offer DSL services at a flat monthly rate, including multiple email addresses, static IP addresses and web page hosting. New Mexico ISPs allow DSL service to be used as routed connections if the customer chooses, and charge the same rate no matter how many PCs are attached. Local New Mexico ISPs charge business and residential customers the same rates for the same level of service. The use of domain names by businesses and residents are encouraged and supported by local New Mexico ISPs. Local ISPs offer better service than MSN, and at the same prices. MSN gets the benefit of all of Qwest's constant advertising and the benefit of Qwest's volume discounted prices, however.

There is effectively no competition for residential DSL services in New Mexico. There is not likely to be any in the future. Qwest still has no competition for residential voice service in New Mexico six years after the 1996 Telecommunications Act.

New Mexico ISPs are dependent on Qwest to provide services to them at tarified prices, in good faith, while having to compete with Qwest or Qwest's affiliate at the same time. This situation is similar to that experienced by CLECs. CLECs have somewhat more protection from abuses by Qwest, however. CLECs can take their complaints to the New Mexico PRC; ISPs cannot.

Competition from Qwest affiliates is not, however, the biggest problem faced by New Mexico ISPs. They have an even bigger problem with Qwest. The single largest complaint from New Mexico ISPs regarding Qwest has to do with billing errors. When Qwest charges an ISP incorrectly for a service, it is up to the ISP to prove the charge is incorrect. Even when Qwest acknowledges that the charge is incorrect, Qwest may not necessarily remove the charge from the ISP's bill. If the ISP protests the incorrect charge and does not pay it, Qwest may refuse to accept any new orders for telecommunications services from the ISP, based on the claim by Qwest that the ISP is "delinquent" in paying for services. ISPs have attempted to complain to the New Mexico PRC about such practices. The PRC cannot help the New Mexico ISPs, however. Almost every telecommunications service that an ISP orders from Qwest is tarified under the FCC tariffs, not the State tariffs.

New Mexico ISPs are increasingly frustrated by the overwhelming efforts that they have to exert just to stay in business. Many New Mexico ISPs are giving up. It is too hard to constantly fight the Qwests, MSNs, Comcasts, and other large monopolies. It feels to local ISPs like there is no recourse when repeated abuses of power by large companies like Qwest continue to happen over and over.

Individual DSL customers do not, for the most part, know how to file a complaint with the FCC. It is also difficult for many New Mexico ISPs to file complaints with the FCC. Most local ISPs are small businesses with only a few employees. The owners of these businesses are responsible for everything that happens in their companies. These owners rarely understand the subtleties of the telecommunications regulatory environment. Many do not understand that the telecommunications services that they order are not under the authority of the New Mexico PRC. New Mexico ISPs are frustrated that they seemingly have no one to turn to for relief from repeated anti-competitive actions directed at them by Qwest.

There are a few ISP owners who have become somewhat knowledgeable, over time, regarding the nuances of which telecommunications services are regulated under the PRC versus which services are regulated by the FCC. These ISP owners do not file

complaints with the FCC for a different reason, however. To a small ISP in New Mexico, the FCC seems like a very large Washington DC establishment. It also seems very busy, very complex, very structured, and very far away. Many local ISP owners are simply too intimidated to file a complaint with the FCC. There is also fear among many New Mexico ISPs that if they do file a complaint against Qwest, and Qwest finds out about it, then Qwest will somehow "punish" the ISP. There is some evidence to support this fear.

NMIPA recognizes that the FCC has taken steps to make filing comments and complaints easier. For a small ISP in a rural state, however, it is still very difficult. There are some New Mexico ISPs who have filed complaints at the FCC. There is, however, a strong feeling among those who have filed complaints that "it didn't do any good". There is a strong feeling that one New Mexico ISP will never be heard above the din of the many Qwest lobbyists, the constant Qwest public relations hyperbole and the hundreds of Qwest regulatory attorneys.

New Mexico ISPs continue to disappear. When local ISPs go away, so will local Internet access in smaller towns and communities served by Qwest. Neither Qwest nor MSN offers local dial-in Internet access in such communities today. AOL, Comcast and other national providers do not offer Internet access in such communities either. If local ISPs go away, businesses in these communities will not have Internet access. Economic development in rural areas will suffer. Businesses will suffer and perhaps move away. There are, today, only 14 New Mexico ISPs offering Qwest DSL services. It is unlikely that there will be that many next year.

NMIPA respectfully requests that the FCC reconsider the matter of regulatory authority over broadband services. Qwest DSL is a service provisioned over the customer's existing voice telephone line. Qwest DSL is a service which is directed at residential consumers as an "add on" to their basic voice service. It is treated by Qwest, for marketing purposes, in the same manner that it treats voice mail, caller-id, intrastate long distance, and other voice line add-on services. It is bundled with other voice line add-ons in Qwest marketing materials to residential and small business customers.

State regulatory agencies have authority over voice lines, and over most add-on services to these lines. DSL, however, has been deemed an "interstate/interlata service" and is regulated by the FCC. (Qwest is not yet allowed to offer other interstate/interlata services, but can offer DSL. Hundreds of regulatory attorneys have endlessly debated this controversial issue from a legal perspective on various email groups devoted to such topics.)

NMIPA wishes to point out only that:

- Residential and small business DSL consumers are much more likely to contact their local state regulatory agency with complaints and problems than they are to contact the FCC.
- State regulatory agencies are much more likely to respond to residential and small business customer complaints than the FCC is.
- State regulatory agencies are more likely to be receptive to complaints by local ISPs than the FCC is.

Because Qwest DSL service is regulated by the FCC instead of the New Mexico PRC, many New Mexico residential and small business DSL customers and most local New Mexico ISPs are harmed. Competition in Internet access in smaller communities served by large RBOCs and ILECs is disappearing.

Qwest spends hundreds of thousands of dollars on advertising, lobbyists, public relations advisors, and attorneys to assure their position as a monopoly in New Mexico and elsewhere is secure. Qwest's and other RBOCs' standard mantra is that "regulation is the problem". There are very few Qwest customers who would agree. I know of no New Mexico ISPs who would agree. New Mexico ISPs would like Qwest to be more closely regulated, especially in regard to Qwest's relationships with ISPs. New Mexico ISPs would also like to see that regulation be under the authority of the New Mexico PRC, not the FCC.

NMIPA urges the FCC to consider the immense power of the ILECs in providing telecommunications services to residential customers and small business. Consider how confusing national regulatory policies are to the average residential and small business consumer. NMIPA urges the FCC Commissioners to place the regulatory authority over residential and small business DSL services where it belongs, with state regulatory agencies. NMIPA further urges the FCC to grant additional authority to state regulatory agencies in enforcing rules regarding the RBOC relationships with local ISPs who may be in direct competition with RBOC affiliates.

NMIPA encourages the FCC Commissioners to strictly enforce all provisions of the 1996 Telecommunications Act to encourage competition. NMIPA is especially concerned about FCC approval of RBOC 271 applications.

Qwest has devoted, and continues to devote, a great deal of effort to convince New Mexico PRC Commissioners and FCC Commissioners that Qwest's entrance into the interlata/interstate telecommunications market will satisfy the public interest requirements of the 1996 Telecommunications Act with regard to Qwest's 271 application. NMIPA does not believe that this is so. There is no competition in

residential voice service in New Mexico. There is only minimal competition in business voice line service, and only in Albuquerque. There is less competition in telecommunications services in New Mexico today than there was four years ago.

NMIPA urges the FCC Commissioners not to grant approval of Qwest's 271 application until they are completely satisfied that Qwest had fully complied with all requirements of the 1996 Telecommunication Act. NMIPA further urges the FCC Commissioners not to approve Qwest's 271 application until they are completely satisfied that enforceable guarantees have been put in place for Qwest's continued compliance with all such requirements.

The FCC Commissioners have repeatedly stated their support for the further deployment of broadband services. It is the smaller providers and smaller ISPs who will make that happen in rural areas, not the large monopolies. If these smaller providers and ISPs disappear due to abuses of power by the monopolies, it will not happen at all.

Sincerely,

Marianne Granoff
Regional Vice President, ZiaNet, Inc.
and
Chairman of the Board of Directors of the
New Mexico Internet Professionals Association